S.B.CIVIL MISC. APPEAL NO.887/2005

Gulab.
vs.
Dwarkadheesh and another.

DATE OF JUDGMENT ::: 19.1.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. Om Mehta, for the appellant.
Mr. J Gehlot, for the respondents.

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At the request of learned counsel for the parties, the appeal itself is finally heard though the matter was listed for orders on stay petition.

Learned counsel for the appellant submits that the first appellate court committed serious error of law in remanding the matter to the trial court after setting aside the judgment and decree of the trial court dated 3.11.2001.

Brief facts of the case are that the plaintiffs/ respondents filed a suit for ejectment against the defendant/appellant. According to learned counsel for the respondent, the suit was not filed under the provisions of Rajasthan Premises (Control of Rent and Eviction) Act, 1950 and in fact, the suit was filed because in earlier suit, the parties compromised and the defendant agreed that he will vacate the suit shop and also gave an undertaking that

he will vacate the premises within a period of two years. Therefore, the present suit was filed by the plaintiffs to eject the defendant on the basis of undertaking given by him in the earlier filed suit. This fact was specifically pleaded by the plaintiffs in para no.8 of the plaint, copy of which has been shown by learned counsel for the respondents. A notice was served upon the defendant by the plaintiffs on completion of two years of undertaking. The plaintiffs also pleaded in para no.4 of the plaint that the defendant also agreed to increase the rent but he did not pay the rent from January, 1992 at the rate of Rs.375/- per month.

Learned counsel for the respondents also submitted that he did not took any ground of default in payment of rent by the tenant. However, according to learned counsel for the respondents, he specifically pleaded that the defendant acquired a suitable residential accommodation, therefore, the defendant will not suffer any hardship for evicting the suit premises.

Learned counsel for the appellant also submits that the plaintiffs' suit was proceeded ex-parte and after appreciation of evidence, the trial court dismissed the suit of the plaintiffs by specifically deciding that on the basis of pleadings as it is and evidence as is available on the record, the plaintiff failed to prove the default in payment of rent as well as about acquiring suitable residential accommodation by the defendant.

In view of the above, according to learned counsel for

the appellant, the first appellate court could not have remanded the matter back to the trial court for deciding the point which has already been decided by the trial court in the impugned judgment and decree dated 3.11.2001.

It is also submitted that even if the submission of learned counsel for the respondents is accepted, then there was no need of framing issue of default in payment of rent by the defendant.

In view of the above facts and the arguments advanced by both the parties, it is clear that the first appellate court committed error of law in framing the issue no.1 whether the defendant committed default of rent. It is also strange that the first appellate court framed issue about first and second default in the same suit. For this reason also, the order of the first appellate court cannot be allowed to stand. The first appellate court framed the issue about acquiring suitable residential accommodation by the defendant whereas the trial court specifically recorded finding on this point, therefore, the appellate court could not have remanded the matter to the trial court for giving an opportunity to the appellant to only argue the matter before the trial court afresh. The first appellate court's order dated 29.4.2005 on the face of it is perverse because of the simple reason that the matter has been renamed not for recording the evidence on the newly framed issues but only to hear the arguments of the counsel for the plaintiff by the trial court. Such type of the order on the face of it is not only perverse but arbitrary also.

In view of the above, this appeal is allowed, the judgment dated 29.4.2005 is set aside and the first appellate court is directed to decide the appeal on merits.

(PRAKASH TATIA), J.

S.Phophaliya